IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KENT COUNTY EQUIPMENT, INC. and DOROTHY E. SHANK	)	
Plaintiffs,	)	
v.	)	C.A. No. 08C-04-030 JAP
JONES MOTOR GROUP, INC., JAMES J. KOEGEL and JACQUELINE CROSS	)	
Defendants.	)	

Submitted: December 12, 2008
Decided: March 20, 2009

On Jones Motor Group, Inc. and James J. Koegel's
Motion to Dismiss Plaintiffs' Complaint
GRANTED IN PART and
DENIED IN PART.

MEMORANDUM OPINION

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Maria J. Poehner, Esquire, Bifferato & Gentilotti, Wilmington, Delaware, Attorney for Defendant Jacqueline Cross

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A. The Facts[1]

Kent County Equipment ("KCE") was founded approximately 35 years ago by Robert Shank, who remained at the helm until his death in 2003.[2] KCE provided transportation services and equipment to common carriers.[3] In 1974 KCE signed an agreement with Alleghany Corporation doing business as Jones Motor. Under the terms of that agreement, KCE was to lease vehicles with qualified drivers on behalf of Jones.[4] KCE's duties also included dispatching those vehicles to make pickups and deliveries.[5] The customer paid Jones directly, and Jones remitted a specified portion of the net revenue from each trip to KCE as a commission.[6] Although the plaintiffs allege that "Jones was one of Kent County Equipment's largest customers,"[7] the contract attached to the complaint shows that KCE dealt exclusively with Jones and was not permitted to act as an agent for any other motor carrier or shipper.[8]

KCE employed Jacqueline Cross some thirty-two years ago.[9] It is apparent from the plaintiffs' response to the motion to dismiss as well as oral argument that, in the last few years at least, Ms. Cross was the driving force which kept KCE in business. Before his death, Mr. Shank asked Ms. Cross to continue to work for KCE for a period of five

[1] Certain of the facts upon which this Court relies are taken from documents the plaintiffs attached to the Complaint. *Alliance Data Systems v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 752 (Del. Ch. 2009) (on a motion to dismiss a court may consider documents attached to the complaint); Super. Ct. Civ. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").
[2] Complaint, at ¶¶6-7.
[3] *Id.* at ¶6.
[4] Complaint, Ex. A, at ¶3.
[5] *Id.* at ¶4.
[6] *Id.* at ¶9.
[7] Complaint, at ¶8.
[8] Complaint, Ex. A, at ¶16.
[9] Complaint, at ¶12.

years.[10] Apparently Ms. Cross fulfilled her commitment to Mr. Shank in 2007, at which time she concluded that she would reap more financial rewards if, rather than working for an agent, she herself became an agent of a motor carrier. Ms. Cross advised Jones Motor she had an opportunity to become an agent of one of Jones Motor's competitors. Jones Motor became concerned that if Ms. Cross became an agent of another carrier she would take the business she controlled with her. As a result, Jones Motor offered to retain Ms. Cross as its agent. This necessitated termination of the KCE – Jones Motor contract.

On August 2, 2007 Jones Motor wrote to Ms. Shank advising her that it intended to terminate its contract with KCE as of October 1. The 1974 agreement required Jones Motor to provide only 30 days written notice, but Jones Motor provided KCE and Ms. Shank with 60 days notice. Although not required by the contract to do so, Jones Motor also offered to pay KCE two percent of the new terminal's adjusted revenue, which would approximate KCE's profit had it still been Jones Motor's agent. At this stage the record is silent as to whether KCE accepted post-October 1 payments.

The plaintiffs now bring this action in which they allege four counts, which are: (1) malicious interference with business relations, (2) malicious interference with prospective contractual relations, (3) unfair competition, and (4) breach of the implied covenant of good faith and fair dealing. Jones Motor and its president, Defendant James Koegel, have moved to dismiss each of these counts. At oral argument on that motion, the Court *sua sponte* questioned why Mrs. Shank (as opposed to KCE) had any standing to assert these claims. The Court gave Mrs. Shank an opportunity to submit a post-argument letter memorandum of this issue and thereafter the parties stipulated to the

[10] Complaint, Ex. C. The record does not disclose whether Mr. Shank realized that he was suffering from a terminal illness at the time he made this request.

dismissal of her claims.[11] This is the Court's ruling on the motion of Jones Motor and Mr. Koegel to dismiss Plaintiff KCE's complaint.

B. Analysis

1. *Malicious interference with Plaintiff's business relationships (Count I)*

Plaintiff complains of alleged interference with the contract between KCE and Jones Motor. It is not entirely clear precisely which defendants KCE believes interfered with that contract. At one point, Plaintiff alleges only "Defendants Cross and Koegel intentionally interfered with the long standing agreement between Jones Motor and Kent County Equipment …."[12] But elsewhere within the same count they allege that they have suffered injury "as a result of the actions of Defendants Jones Motor, James J. Koegel and Jacqueline Cross."[13] The Court therefore assumes that Plaintiff intended to allege this claim against all of the defendants.

The malicious interference claim must be dismissed because of the well-settled rule that a party cannot tortiously interfere with its own contract.[14] Plaintiff seeks to avoid this rule by arguing that its complaint "alleges intentional interference with business relationships and prospective business relationships.[15] While it is true that Counts II and III refer to business relationships with others, it is also true that Count I unequivocally alleges only interference with the KCE – Jones Motor contract. Therefore, this Count against Jones Motor must be dismissed.

[11] Docket Item 13, filed March 3, 2009.
[12] Complaint, at ¶27.
[13] *Id.* at ¶29.
[14] *Tenneco Automotive, Inc. v. El Paso Corp*., 2007 WL 92621 (Del. Ch. Jan. 8, 2007)(a "defendant cannot interfere with its own contract").
[15] Pl. Response, at ¶5.

Count I against the individual defendants must also be dismissed. "The elements of a tortious interference claim are well established under Delaware law."[16] Plaintiff must show each of the following: (1) a contract, (2) about which the defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) with justification (5) which causes injury.[17] Plaintiff's claim fails because it has not alleged that Jones Motor breached its contract with KCE.[18] Accordingly, Plaintiff cannot satisfy the third element and the Court will therefore dismiss the malicious interference claim against Defendant Koegel.

The same reasons which warrant dismissal of the tortuous interference claim against Defendant Koegel also warrant dismissal of this claim against Defendant Cross. The Court realizes that she has not moved to dismiss this claim, but the Court may enter judgment *sua sponte*.[19] The best practice is, of course, to provide notice to the affected party that the Court is considering a *sua sponte* dismissal. KCE had notice that of the motion to dismiss this claim by Defendant Koegel and had an opportunity to respond to the legal arguments which eventually gave rise to the dismissal of this claim against him. The same legal arguments advanced by Defendant Koegel also require dismissal of the claim against Defendant Cross. The Court concludes, therefore that KCE has had ample opportunity to present its contentions and has, indeed, already done so. Thus, KCE has

[16] *Aspen Advisors LLC v. United Artists Theatre Co*., 861 A.2d 1251, 1265-6 (Del. 2004).
[17] *Id.* at 1266.
[18] At oral argument Plaintiff's counsel conceded the complaint contains no such allegation. Indeed, there are no grounds apparent to the Court upon which Plaintiff could base a claim that the contract was breached. The contract was terminable at will with only a 30 day written notice required. The allegations in the Complaint show that Jones Motor complied with that notice requirement.
[19] *Gibson v. Mayor and Council of Wilmington*, 355 F.3d 215, 222 (3d Cir. 2004) ("It has long been established that, under the right circumstances, district courts are allowed to enter summary judgment *sua sponte*").

had ample notice of the arguments against it.[20] The Court sees little reason to require Defendant Cross to go the expense of a *pro forma* motion in order to obtain the relief to which this Court has already determined she is entitled.

2. *Malicious interference with prospective contractual relations (Count II) and unfair competition (Count III)*

The moving defendants also seek dismissal of Counts II and III of the Complaint. Count II alleges a claim for malicious interference with prospective business relations and Count III alleges unfair competition. The gist of both counts is that one or more of the defendants wrongfully transferred a 1-800 telephone listing for KCE. Plaintiff alleges that KCE customers "who regularly called the 1-800 business number to conduct business with Kent County Equipment were purposely directed to Defendants Cross and Jones Motor."[21]

In order to establish a claim of malicious interference or unfair competition, Plaintiff must allege and later prove that the defendants committed a wrongful act.[22] The elements of tortious interference with prospective business relationships are (1) the reasonable expectation of a business opportunity; (2) intentional interference with that opportunity by the defendant; (3) proximate causation and (4) damages.[23] Where, as here, the "interferer is seeking to acquire business for himself, an interest of this type is important and will ordinarily prevail over a similar interest of the other if [the interferer] does not use wrongful means."[24] The elements of the tort of unfair competition are

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[20] *See Couden v. Duffy*, 446 F.3d 483, 500 (3d Cir. 2006).
[21] Complaint, at ¶34.
[22] *Delaware Solid Waste Authority v. Eastern Shore Environmental*, 2002 WL 537691 (Del. Ch. March 28, 2002)("Only wrongful interferences will satisfy the tort [of unfair competition]").
[23] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).
[24] *Gillenardo v. Conner Broadcasting Delaware Co.*, 1999 WL 1240837 (Del. Super. Oct. 27, 1999) (internal quotation marks omitted).

similar: (1) plaintiff must have a reasonable expectation of entering a valid business relationship, (2) the defendant must wrongfully interfere with that relationship and (3) thereby cause the plaintiff harm.[25]

The moving defendants argue that Plaintiff fails to allege that they engaged in any wrongful conduct. They assert, correctly, that the Complaint alleges that Defendant Cross transferred the telephone number.[26] Elsewhere, however, Plaintiff alleges that "Jones Motor and Defendant Koegel hired Defendant Cross as an agent with the intent to wrongfully transfer the 1-800 business number …."[27] The Complaint can therefore reasonably be construed to allege that Defendant Cross was acting as the agent of Jones Motor when she wrongfully transferred the telephone number. Consequently Jones Motor's motion must be denied in this respect.[28]

This does not end the inquiry with respect to Defendant Koegel, however. Plaintiff alleges that "[a]t all times relevant hereto, Defendant Koegel is, upon

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[25] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043 (Del. Super. 2001).

[26] Complaint, at ¶20 ("Defendant Cross wrongfully transferred the 1-800 business telephone number from Kent County Equipment for use at Jones Motor.").

[27] *Id.* at ¶15.

[28] In their motion defendants argue that these claims should be dismissed because it is too speculative to assume that KCE's "customers" would have remained with KCE if KCE had retained the 1-800 number and therefore KCE had no expectation of continuing relationships with persons it previously solicited on behalf of Jones Motor. This argument has considerable appeal. The Court of Chancery dismissed a similar claim on the basis that the future business relationships were too speculative. In *Rypac Packaging Machinery Inc. v. Coakley*, 2000 WL 567895, *6 (Del. Ch. May 1, 2000) the court wrote:

> [I]t cannot be assumed that the [customers] would have permitted Rypac to complete the sales Coakley was pursuing when he resigned. Given the national and highly competitive nature of this particular market, there is no basis to assume that any [customer] would have automatically chosen Rypac to complete the sales.

Despite the appeal of this argument, this Court believes that under the circumstances of this case it is best to await further development of the record before considering it.

Similarly it appears to the Court that plaintiff's claim may be barred because plaintiff accepted severance payments in excess of those called for by its contract with Jones Motor in exchange for KCE's agreement to transfer the telephone number to Ms. Cross (Complaint, Ex.C). This too needs further development in the record.

information and belief, the president of Jones Motor …."[29] Defendant Koegel, citing the Court of Chancery's opinion in *Wallace v. Wood*,[30] argues that he cannot be held liable for these alleged torts so long as he was acting within the scope of his authority at Jones Motor. Some of the defendants in *Wallace* were officers of a corporation which was the general partner in a Delaware limited partnership. The limited partners brought suit against the corporate officers and others, claiming in part that the corporate officers were liable to them because they caused the corporate general partner to breach the limited partnership agreement. On a motion to dismiss the Court of Chancery held that the limited partners had sufficiently alleged that the officers tortiously interfered with the limited partnership agreement between the corporate general partner and the limited partners. Nonetheless it held that the officers were not liable absent an allegation that they exceeded the scope of their authority. The court reasoned:

> However, the Officers could only be liable for tortious interference with their own company's contract if they exceeded the scope of their authority. "[E]mployees acting within the scope of their employment are identified with the defendant himself so that they may ordinarily advise the defendant to breach his own contract without themselves incurring liability in tort." "This rationale is particularly compelling when applied to corporate officers as 'their freedom of action directed toward corporate purposes should not be curtailed by fear of personal liability.' "[31]

The Court of Chancery scrutinized the complaint and found no "specific allegation that the officers exceeded the scope of their authority to act on behalf of the [corporate] General Partner." Accordingly it dismissed the claims against the officers.

This Court believes that the rationale in *Wallace* is a sound one and should be applied here. The question becomes whether KCE has alleged that Defendant Koegel

[29] Complaint, at ¶4.
[30] 752 A.2d 1175 (Del. Ch. 1999).
[31] *Id*. at 1182-3.

exceeded the scope of his authority. The Complaint is wholly devoid of any such allegation. To the contrary, the allegations in the Complaint are consistent with the proposition that Koegel was acting within the scope of his authority. For example, as mentioned previously, on August 2, 2003 Koegel wrote a letter to Dorothy Shank (then president of KCE) advising her of Jones Motor's intention to switch agents and of its desire to obtain the 1-800 telephone number. Plaintiff characterizes this letter in its Complaint[32] as having been written by "Jones Motor," thus tacitly conceding that Koegel was acting within the scope of his authority when he wrote the letter. Other allegations demonstrate that the entire transaction was for the benefit of Jones Motor:

- "Defendant Cross secretly negotiated the agency agreement with Jones Motor."[33]
- Defendant Cross "wrongfully transferred the 1-800 business telephone number along with the business …. to Jones Motor."[34]
- "Defendant Cross left her employment with Kent County Equipment and began working as an agent for Jones Motor."[35]
- "Defendant wrongfully transferred the 1-800 business telephone number from Kent County Equipment for use at Jones Motor."[36]
- "As a result, the Kent County Equipment customers became customers of Jones Motor."[37]
- "As a result of the willful actions of Defendants Cross and Jones Motor, Kent County Equipment is now defunct."[38]
- "Kent County Equipment customers …. were purposely directed to Defendants Cross and Jones Motor."[39]

[32] Complaint, at ¶¶13, 14, 16.
[33] *Id.* at ¶17.
[34] *Id.* at ¶18.
[35] *Id.* at ¶20.
[36] *Id*. at ¶20.
[37] *Id*. at ¶21.
[38] *Id*. at ¶22.
[39] *Id*. at ¶34.

KCE cites to this Court's opinion in *Smith v. Hercules*[40] and argues that defendant Koegel's motion to dismiss should be denied because of the possibility that he personally benefitted from his conduct. In *Smith* the plaintiff sued Hercules and its CEO Thomas Gossage, alleging among other things that Gossage tortiously interfered in a contract between Hercules and plaintiff. This Court held that plaintiffs "cannot hold Gossage personally liable for his actions taken in his capacity as a Hercules CEO, so long as the decisions he made were business judgments relating to operation of the company."[41] It found an exception, however, when a corporate official's decision was not motivated by his corporate responsibilities but were instead made to further his personal investments. The *Smith* court found that the allegations in the complaint could be construed to allege that Gossage was motivated not by his corporate responsibilities but rather by his desire to advance his stock and option holdings in Hercules. It therefore denied Gossage's motion to dismiss.

The allegations in *Smith* are distinct from those in the instant matter. In *Smith* the plaintiff alleged that the officer received one million Hercules stock options and 128,003 shares of Hercules stock as payment for his services as CEO. The plaintiff also alleged that the tortious interference by Gossage resulted in enormous savings to Hercules and was undertaken by Gossage "in order to directly benefit from the improved pricing of the stock."[42] In sharp contrast there is no allegation that defendant Koegel was motivated by personal benefit to the exclusion of his corporate responsibilities. Indeed, the Complaint and its attachments show that Jones Motor was motivated by its desire to avoid losing

[40] 2002 WL 499817 (Del. Super., March 28, 2002).
[41] *Id.* at *3.
[42] Id. at *2.

customers who had previously dealt with Ms. Cross.[43] Therefore, *Smith v. Hercules* does not mandate denial of defendant Koegel's motion.

In light of the absence of any allegation that Defendant Koegel acted without authority from Jones Motor, and in light of the allegations demonstrating that the transaction was for the benefit of Jones Motor, the Court will dismiss the claims in Count II and Count III against Defendant Koegel.

3. *Breach of implied covenant of good faith and fair dealing (Count IV)*

Plaintiff alleges that the defendants violated the implied covenant of good faith and fair dealing when Jones Motor terminated its agreement with KCE. Although there is an implied covenant of good faith and fair dealing in every contract, the courts of this state have been reluctant to impose obligations under that implied covenant.[44] Certainly it is not the proper role of a court to rewrite an agreement under the guise of applying the implied covenant.[45] The purpose of the implied covenant is to supply terms which the parties overlooked while negotiating an agreement. A court can do so, however, only when "it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter."[46] It goes without saying therefore that the implied

[43] In its August 2, 2007 notice of termination letter, Jones Motor wrote:

> [W]e were told that [Ms. Cross] had an offer to open an Agency for one of our competitors and that if we were unwilling to make her an Agent she would be leaving Jones and taking the business and equipment she controls to another carrier.

(Complaint, Ex C).

[44] *Homan v. Turoczy*, 2005 Del. LEXIS 121, at *63 (Del. Ch. Ct. August 12, 2005) ("the Delaware Supreme Court has consistently held that obligations under the covenant of good faith and fair dealing should be implied only in rare cases").

[45] *Cincinnati SMSA Ltd. Pshp. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 991 (Del. 1998).

[46] *Corporate Prop. Associates 14 Inc. v. CHR Holding Corp.*, 2008 Del. LEXIS 45, at *19 (Del. Ch. Ct. April 10, 2008).

terms cannot override the written terms of a contract.[47] The KCE – Jones Motor contract contains specific provisions allowing either party to terminate the agreement at will. This Court cannot conclude under the guise of the implied covenant of good faith and fair dealing that this express contractual right has somehow been abridged.[48] Accordingly this claim is dismissed against Jones Motor.

KCE also alleges that the individual defendants breached the same implied covenant of good faith and fair dealing. For the reasons just stated, the implied covenant cannot circumscribe Jones Motor's express right to terminate the contract at will, and for this reason alone KCE's claim against the individual defendants must be dismissed. There is also a further reason requiring dismissal of the claims against the individual defendants. The implied covenant of good faith and fair dealing operates only to bind the parties to an agreement.[49] There is no allegation that either of these defendants was a party to the KCE—Jones Motor agreement and therefore they could not, as a matter of law, have breached an implied covenant arising from that contract.

C. Conclusion

Moving defendants' motion to dismiss Counts I and IV is **GRANTED**. The claim alleged in Count s I and IV against defendant Cross are also **DISMISSED**. Defendant

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[47] *Gilbert v. El Paso Corp.*, 575 A.2d 1131, 1134 (Del. 1990).

[48] Further KCE acknowledged at oral argument that it could not point to any contract language from which the Court could deduce a limitation on the right to terminate the contract at will.

[49] The Court of Chancery succinctly described the role of the implied covenant as follows:

> Stated in its most general terms, the implied covenant requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain. Thus, *parties* are liable for breaching the covenant when their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms.

Dunlap v. State Farm Fire and Cas. Co., 2007 WL 2390682*11 (Del. Ch. Aug. 3, 2007)(emphasis added).

Koegel's motion to dismiss Counts II and III is **GRANTED**. Defendant Jones Motor's motion to dismiss Count s II and III is **DENIED.**

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oc: Prothonotary